BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LARY M. OSBORN Claimant VS. **ELECTRIC CORPORATION OF KANSAS CITY** Respondent AND **TRANSPORTATION INSURANCE COMPANY** Insurance Carrier	)	Docket No. 166,784

ORDER

Both the claimant and respondent appeal from an Award rendered by Administrative Law Judge Robert H. Foerschler on July 26, 1995. The Appeals Board heard oral argument December 19, 1995.

APPEARANCES

Claimant appeared by and through his attorney, Dennis L. Horner of Kansas City, Kansas. Respondent and its insurance carrier appeared by and through their attorney, Anton C. Andersen of Kansas City, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has reviewed and considered the record listed in the Award. The Appeals Board has also adopted the stipulations listed in the Award.

ISSUES

On appeal the respondent and its insurance carrier request that the Appeals Board review the issue of whether the claimant is entitled to an award for permanent partial disability pursuant to the provisions of K.S.A. 1991 Supp. 44-501(c).

Claimant requests that the Board review the following issues:

(1) Claimant's average weekly wage; and
(2) Claimant's right to future medical treatment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties, the Appeals Board finds and concludes as follows:

(1) The provisions of K.S.A. 44-501(c) do not preclude claimant from receiving an award for permanent partial disability.

The claimant, a co-owner of the respondent company, lost no time from work as a result of his injury. Counsel for respondent argues that claimant should not be entitled to any compensation for permanent partial disability pursuant to K.S.A. 44-501(c) which provides:

> "Except for liability for medical compensation, as provided for in K.S.A. 44-510 and amendments thereto, the employer shall not be liable under the workers compensation act in respect of any injury which does not disable the employee for a period of at least one week from earning full wages at the work at which the employee is employed."

The Appeals Board addressed this same issue in Robert Boucher v. Peerless Products, Inc. and Home Indemnity Company, Docket Number 184,576 (opinion filed April 28, 1995). In that case the Appeals Board found that K.S.A. 44-501(c) does not preclude a claimant from recovering permanent partial disability benefits because he did not miss any time from work after his accident, following the holding by the Kansas Supreme Court in Raffaghelle v. Russell, 103 Kan. 849, 176 P. 640 (1918). See also Gillig v. Cities Service Gas Co., 222 Kan. 369, 564 P.2d 548 (1977). The Appeals Board declines to alter its judgement on this issue.

(2) The Appeals Board finds claimant's average gross weekly wage to be $2,030.40 and his compensation rate to be $1,353.60.

It is not disputed that claimant received a base wage of $702.69 bi-monthly from his employer. What is in dispute is the payment of additional monies and/or compensation paid to claimant in the form of overtime, bonuses and/or commissions and respondent's payment to a separate corporation owned by claimant and his wife.

Claimant met with personal injury by accident on January 13, 1992. At the time of his accident, claimant was one of two stockholders in respondent Electric Corporation of Kansas City, hereinafter referred to as "ECKC". Claimant and Mr. Stein, the other stockholder, each received checks twice a month from ECKC in the amount of $702.69. His base salary would be considered as "fixed by the month" for purposes of average gross weekly wage computation and be controlled by K.S.A. 1991 Supp. 44-511(b)(2). The calculation requires multiplying the $702.69 bi-monthly salary by 24 and dividing by 52. This provides an average gross weekly wage of $324.32. The Administrative Law Judge made this same calculation but added to the $702.69 bi-monthly salary, "the average weekly overtime obtained by dividing $5,000.00 by 26. This gives an average weekly wage of $516.62." Respondent argues that the average weekly wage finding by the Administrative Law Judge should be affirmed.

The $5,000.00 overtime figure was based upon an alleged agreement between claimant and the other shareholder that claimant would receive $10,000.00 a year in overtime, which would amount to $5,000.00 during a 26 week period. However, the record does not establish that the claimant received a $10,000.00 payment during the year immediately preceding the date of accident. The record does establish that claimant received a check from ECKC in the amount of $8,741.00 on August 22, 1991. Claimant testified that this sum was for overtime. However, he could not say what period of time that check covered. He was pretty sure that the check was not for the one-week period ending August 22, 1991. Likewise, he could not say how much of that overtime payment was

attributable to the period July 13, 1991 to August 22, 1991, these being the dates prior to the issuance of the overtime payment that would fall within the 26 weeks next preceding the date of accident. Claimant further testified that he did not receive any other payments for overtime work during 1991. Claimant could not say how frequently he was paid overtime. He stated sometimes overtime was paid more than once a year and sometimes less. Nevertheless, he believed the $8,471.00 was all of the money he received for overtime for the year from January 16, 1991 through January 15, 1992. The Appeals Board finds that in the absence of any evidence establishing the amount of overtime claimant worked and was paid during the 26 weeks immediately preceding his date of accident, no overtime payments can be included in the calculation of claimant's average weekly wage.

The parties now disagree about the treatment to be given the $88,716.00 claimant received in commissions and bonuses during 1991. The Administrative Law Judge noted in his Award that the respondent appeared willing to concede that claimant's average weekly wage calculation should include these payments of bonuses and commissions. However, the Administrative Law Judge found respondent's concession not to be binding upon the Division since average weekly wage was an issue which the Administrative Law Judge was being asked to decide and it would be based upon the same figures the claimant was using to establish his position. Since it could not be determined what particular periods the alleged bonuses and commissions included, the Administrative Law Judge excluded the $88,716.00 from his average weekly wage computation. The Appeals Board agrees that the record does not establish what, if any, portion of the so-called commissions and bonuses was paid and/or earned during the 26 weeks next preceding the date of accident. Furthermore, claimant admitted that he continued to work for ECKC following his accident and he continued to receive the same bonuses and commissions outlined in the wage statement. In fact, at the time of the regular hearing, claimant was actually making more money working for respondent than he was at the time of his accident.

K.S.A. 1991 Supp. 44-511(a)(1) provides:

> "The term "money" shall be construed to mean the gross remuneration, on an hourly, output, salary, commission or other basis, at which the service rendered is recompensed in money by the employer, but it shall not include any additional compensation, as defined in this section, any remuneration in any medium other than cash, or any other compensation or benefits received by the employee from the employer or any other source."

The term "additional compensation" is defined in K.S.A. 1991 Supp. 44-511(a)(2)(B) to include:

> "[A]ny cash bonuses paid by the employer within one year prior to the date of the accident, for which the average weekly value shall be determined by averaging all such bonuses over the period of time employed prior to the date of the accident, not to exceed 52 weeks;"

K.S.A. 1991 Supp. 44-511(a)(2)(E) which provides in pertinent part:

> "Additional compensation shall not include the value of such remuneration until and unless such remuneration is discontinued."

Respondent does not argue in his Brief On Appeal that the so-called "commissions and bonuses" constitute "additional compensation" within the meaning of the statute, such that they are not to be included in the computation of claimant's average weekly wage unless discontinued. Instead, respondent argued that the payment of the $88,716.00 was

based upon an agreement between claimant and his co-owner for a division of profits. However, since there is no evidence as to how this figure was derived, they should be excluded from claimant's average weekly wage. It should be noted that during his oral argument to the Appeals Board, respondent did equate his so-called "bonus" to "additional compensation" under K.S.A. 44-511. From the evidence presented, the Appeals Board finds that what has been described as commissions and bonuses are, in fact, more in the nature of profit sharing, not bonuses which the claimant is continuing to receive. The $88,716.00 is, therefore, includable in the calculation of the claimant's average weekly wage as money which claimant received as part of his gross remuneration for services rendered. It should be included in the calculation of claimant's average gross weekly wage pursuant to K.S.A. 1991 Supp. 44-551(b)(5). It is correct that the record does not reflect the precise gross amount of money earned by claimant during the 26 calendar weeks immediately preceding the date of accident, however, it is clear that claimant received the $88,716.00 sum for the 1991 calendar year. It can, therefore, be divided by 52 weeks to arrive at its average weekly value of $1,706.08.

The third and final payment which claimant contends should be included in the calculation of his average weekly wage is the sum of $16,864.56 which was paid to Osborn Industries. Osborn Industries is a Missouri Subchapter S Corporation in which claimant and his wife are the sole shareholders. The $16,864.56 paid by ECKC to Osborn Industries was for consulting services performed on behalf of ECKC by Osborn Industries. The Appeals Board finds, as did the Administrative Law Judge, that such payment is not includable as part of the wages received by claimant from the respondent. It is impossible to determine what portion of this payment, if any, was paid to claimant as an employee of ECKC as opposed to work he performed as an employee of Osborn Industries.

For the reasons stated, the Appeals Board finds that only the bi-monthly payment of $702.69 and the profit sharing or commission annual payment of $88,716.00 can be included in the claimant's average weekly wage. The overtime and the payments to Osborn Industries cannot be so included. It is noted that respondent argued for this same calculation of claimant's average weekly wage in its submission brief to the Administrative Law Judge.

(3) Claimant is entitled to future medical benefits only upon proper application to and approval of the Director.

Respondent argues that claimant has failed to establish his entitlement to future medical benefits by virtue of the fact that no physician was deposed in this case and no medical evidence was introduced. This was no doubt due to the fact that the parties stipulated to the percentage of claimant's functional impairment. Nevertheless, at regular hearing, claimant testified that he intended to leave open his right to receive additional medical care and treatment should it become necessary. (Regular hearing, p. 14). He further testified that surgery had been recommended by one or more of the physicians that claimant had seen in connection with his injuries, but that claimant had decided to forego, or at least postpone, surgery for as long as possible. (Claimant's depo. pp. 14, 15 & 17). He was able to continue working and performed most of his former job duties. In addition, the massage therapy he was receiving was helping relieve most of his symptoms. So long as he could get by satisfactorily by modifying his job duties and receive symptomatic relief from the massage therapy, claimant was content to defer surgery. The claimant's testimony concerning advice he had received from the physicians was received without objection from the respondent. Failure to raise an objection to the admissability of evidence at the trial level precludes the raising of such an issue on appeal. Furthermore, the need for future medical treatment by an injured worker is a question of fact. Medical testimony is not essential to the establishment of this fact. See Hardman v. City of Iola, 219 Kan. 840, 549 P.2d 1013 (1976), Reese v. Gas Engineering & Construction Co., 219

Kan. 536, 548 P. 2d 746 (1976), Chinn v. Gay & Taylor, Inc., 219 Kan. 196, 547 P.2d 751 (1976).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Robert H. Foerschler dated July 26, 1995, should be, and hereby is, modified as follows:

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Lary M. Osborn, and against the respondent, Electric Corporation of Kansas City, and the insurance carrier, Transportation Insurance Company, for an accidental injury sustained on January 13, 1992 and based upon an average gross weekly wage of $2,030.40.

The claimant is entitled to 415 weeks of permanent partial disability compensation at $172.59 per week for a 12.75% permanent partial general bodily disability making a total award of $71,624.85. As of December 29, 1995, there would be due and owing to the claimant 206.43 weeks permanent partial compensation at $172.59 per week in the sum of $35,627.75 which is ordered paid in one lump sum less any amount previously paid. Thereafter, the remaining balance in the amount of $35,997.10 shall be paid at $172.59 per week for 208.57 weeks or until further order of the Director.

Future medical expense is awarded only upon proper application to and approval of the Director.

All other orders of the Administrative Law Judge contained in his Award of July 26, 1995 not inconsistent with this decision, are hereby adopted by the Appeals Board.

Costs of transcripts in the record are taxed against respondent and insurance carrier as follows:

Richard Kupper & Associates	$207.80
Metropolitan Court Reporters, Inc.	$233.40

IT IS SO ORDERED.

Dated this ____ day of January 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dennis L. Horner, Kansas City, Kansas
Anton C. Andersen, Kansas City, Kansas
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director